(14)

No. 95-809

In the Supreme Court of the United States

OCTOBER TERM, 1995

LOCKHEED CORPORATION, ET AL., PETITIONERS

v.

PAUL L. SPINK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS IN PART

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QUESTIONS PRESENTED

1. Whether an employer's amendment of a pension plan, to provide for enhanced early retirement benefits, conditioned upon the employee's waiver of any claims the employee may have against the employer "arising from termination of employment or otherwise," constitutes a "prohibited transaction" within the meaning of Section 406 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1106.

2. Whether the Omnibus Budget Reconciliation Act of 1986 (OBRA 1986) requires a plan that lawfully denied the right to participate to employees who were 60 or older when hired (before OBRA 1986 became effective) to take into account for benefit accrual purposes the years of service in which those employees were lawfully excluded from participation.

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INTEREST OF THE UNITED STATES

The Secretary of Labor is responsible for interpreting and enforcing the fiduciary obligation provisions in Title I of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. 1001 *et seq.*) and 26 U.S.C. 4975. The Secretary of the Treasury is responsible for interpreting and enforcing Sections 9201-9204 of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874. See also Reorganization Plan No. 4 of 1978, 92 Stat. 3790 (allocating administrative responsibilities under ERISA).

STATEMENT

1. Lockheed Corporation is the sponsor and a named fiduciary of a noncontributory defined-benefit pension

plan, known as the Lockheed Corporation Retirement Plan for Certain Salaried Employees (the Plan). J.A. 45. The Plan is administered by a second named fiduciary, the Retirement Plan Committee, whose members are appointed by Lockheed's board of directors. J.A. 45-46. The Committee is responsible for determining benefit eligibility and certifying such eligibility to the Plan's trustee (the third named fiduciary) for purposes of benefit disbursement. J.A. 46-47.

2. In May 1979, respondent accepted an offer of employment from Lockheed. He was 61 years old. At that time, the Plan lawfully excluded from participation all employees who had reached age 60 when hired. Respondent alleges that, notwithstanding its general policy, Lockheed represented that if he accepted employment he would participate in the Plan and accrue credited service toward retirement benefits. In 1984, however, Lockheed notified respondent that he was not eligible to participate in the Plan because he was over 60 years old when hired. Pet. App. 2a-3a.

3. The Omnibus Budget Reconciliation Act of 1986 (OBRA 1986), Pub. L. No. 99-509, 100 Stat. 1874, amended Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*; Title II of ERISA (codified in various provisions of the Internal Revenue Code, 26 U.S.C. 1 *et seq.*); and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 631 *et seq.*, to prohibit pension benefit plans from discriminating against employees on the basis of age. Although prior law had generally barred plans from denying participation because of age, ERISA contained an express exception that permitted a plan to exclude any employee who was hired within five years of the plan's specified "normal retirement date" (typically age 65). See 29 U.S.C. 1052(a)(2) (1982); 26 U.S.C. 410(a)(2) (1982). Section 9203 of OBRA 1986 (100 Stat. 1979) eliminated that exception. Sections 9201 and 9202 of OBRA 1986 (100 Stat. 1973, 1975) amended the ADEA

and ERISA to prohibit a different discriminatory practice, whereby a plan would cease accruing benefits for a participant (or reduce the rate of accrual) once the participant reached normal retirement age. Those amendments are codified at 29 U.S.C. 623(i)(1), 26 U.S.C. 411(b)(1)(H)(i), and 29 U.S.C. 1054(b)(1)(H)(i).

When OBRA 1986 took effect, Lockheed amended its Plan to eliminate the ban on participation by employees hired after they reached age 60. Pet. App. 3a-4a. As amended, however, the Plan provided that those employees who had previously been excluded from participation because of their age would "not receive Credited Service for [their] pre-Member service." *Id.* at 4a. Accordingly, although respondent became a participant, he received no credit for his prior years of service. *Ibid.*

4. In May 1990, Lockheed amended the Plan to establish two early retirement programs, which offered enhanced pension benefits (paid out of the Plan's assets) to certain salaried employees as an incentive for those employees to voluntarily terminate their employment. Pet. App. 4a. Any employee who wished to participate was required first to execute a release waiving "any claims the [employee] may have against [Lockheed] arising from termination of employment or otherwise." *Id.* at 17a. Respondent was eligible for early retirement, but he did not participate because he did not want to release any ADEA or ERISA claims that he might have had against Lockheed. *Id.* at 4a.

5. Respondent retired in June 1990. Pet. App. 4a. In February 1992, he filed suit against Lockheed, its executive officers, and other officers who served on Lockheed's Retirement Plan Committee (collectively, petitioners). *Ibid.* Respondent claimed (both individually and as a representative of all similarly situated employees): (i) that OBRA 1986 required the Plan to count, for purposes of pension accrual, an employee's years of service prior to OBRA 1986's effective date even if the employee had

been lawfully excluded from participation during such period; and (ii) that, to the extent that the 1990 Plan amendments required a broad waiver of claims against Lockheed as a condition to eligibility for enhanced early retirement benefits, the adoption and implementation of those amendments constituted a breach of fiduciary duty and a prohibited transaction, under Sections 404(a)(1) and 406(a)(1)(D) of ERISA, 29 U.S.C. 1104(a)(1), 1106(a)(1)(D). Pet. App. 4a; J.A. 14-24.[1]

The district court granted petitioners' motion to dismiss the complaint. Pet. App. 23a-35a. The court rejected respondent's contention that Lockheed had breached a fiduciary duty or caused the Plan to engage in a prohibited transaction by amending the Plan to require a release of claims against Lockheed in return for enhanced early retirement benefits, on the ground that Lockheed acted as sponsor, not fiduciary, when it amended the Plan. *Id.* at 31a. The court also rejected respondent's claim that OBRA 1986 required the Plan to count, for purposes of pension accrual, years of service in which respondent had been lawfully excluded from participation. *Id.* at 25a-28a. The court observed that OBRA Section 9203's elimination of preexisting exceptions to the general ban on age-based exclusions from participation applies only with respect to plan years beginning on or after January 1, 1988, Pet. App. 27a (citing OBRA 1986, Pub. L. No. 99-509, § 9204(b), 100 Stat. 1980); and it reasoned that, if respondent was not entitled to retroactive Plan participation, neither was he entitled to retroactive benefit accrual. Pet. App. 28a.

[1] Respondent also claimed that, because he relied on Lockheed's representation that he would be permitted to participate in the Plan, Lockheed was estopped from denying him pension benefits based on his full years of service. Pet. App. 4a-5a. The district court rejected that claim. *Id.* at 33a-34a. The court of appeals did not address that issue because it concluded that OBRA 1986 required Lockheed to credit the same service. *Id.* at 13a n.4.

6. The court of appeals reversed. Pet. App. 1a-21a. It held that the 1990 Plan amendments that conditioned eligibility for enhanced early retirement benefits on the employee's execution of a waiver releasing Lockheed from all potential employment-related claims violated Section 406(a)(1)(D) of ERISA, 29 U.S.C. 1106(a)(1)(D), which prohibits a fiduciary from causing a plan to engage in a transaction if the fiduciary knows or should know that it constitutes a "direct or indirect * * * transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." Pet. App. 13a-18a.[2]

The court acknowledged that Lockheed was "free to disregard employees' interests in amending the plan"; but it was not free, in the court's view, "to disregard the prohibitions of ERISA" in doing so. Pet. App. 16a. Here, the court reasoned, since Section 406(a)(1)(D) "would clearly forbid Lockheed from writing checks drawn on pension funds to buy the releases in question," Lockheed was similarly prohibited from requiring the releases as a condition precedent to receipt of Plan funds in the form of enhanced early retirement benefits. Pet. App. 16a. The court was not persuaded, moreover, that the releases at issue here—which, if valid, would "relieve[] Lockheed of countless * * * potential liabilities to thousands of employees"—constituted merely an "incidental benefit" to Lockheed. *Id.* at 17a-18a.

[2] The court did not address respondent's alternative claim that Lockheed's amendment of the Plan constituted a breach of fiduciary duty under 29 U.S.C. 1104(a)(1)(A)(i), nor respondent's contention that the fiduciaries' application of the amendment caused an unlawful inurement of Plan assets to Lockheed's benefit, in violation of 29 U.S.C. 1103(c)(1). Pet. App. 14a n.3. The court concluded that Lockheed could be held liable for the benefits it received as a party in interest to a prohibited transaction, *id.* at 14a-15a; see also *Reich* v. *Rowe*, 20 F.3d 25, 31 (1st Cir. 1994); *Reich* v. *Compton*, 57 F.3d 270, 285-287 (3d Cir. 1995); *Reich* v. *Stangl*, 73 F.3d 1027, 1031 (10th Cir. 1996). Petitioners do not take issue with that aspect of the court of appeals' decision.

The court of appeals also held that OBRA 1986 applies retroactively to require plans to credit employees for prior service at a time when they were lawfully barred from plan participation. Pet. App. 5a-13a. The court relied, however, not on Section 9203 of OBRA 1986 (which addresses age-based discrimination with respect to plan participation), but instead on Sections 9201 and 9202 (which address the cessation of accrual of benefits or reduction in the rate of accrual of benefits).

SUMMARY OF ARGUMENT

A. The decision whether to establish a pension plan and, if so, what level of benefits to provide, is made by an employer in its capacity as plan sponsor. Such decisions are not subject to ERISA's fiduciary standards. Once the plan has been established, however, the assets that the employer contributes to the plan belong to the plan, not to the employer, and plan management is subject to the strict fiduciary requirements in Title I of ERISA. Those fiduciary requirements reflect Congress's determination to prevent the appropriation or misuse of plan assets by employers and other related parties. To that end, Section 406 of ERISA categorically prohibits fiduciaries from causing plans to engage in certain types of transactions with employers or other parties in interest.

The prohibited transaction rules prohibit a *fiduciary* from causing a plan to engage in a transaction that, directly or indirectly, constitutes a transfer of plan assets to, or use of plan assets by or for the benefit of, a party in interest. Because Lockheed acted as settlor, rather than fiduciary, when it amended the Plan in 1990, the court of appeals erred in holding that the amendments violated ERISA's prohibited transaction rules. The judgment below therefore should be reversed and the case remanded for the court of appeals to consider in the first instance whether Lockheed and the other petitioners violated the

prohibited transaction rules (as well as other fiduciary provisions) in the ***administration*** of the 1990 Plan amendments.

The fiduciaries' payment of the Plan's assets in return for an employee's waiver of claims against Lockheed falls within the literal text of Section 406. If the prohibited transactions rules were enforced literally, however, plans could pay no pensions whatever, because all pension payments redound to the benefit of the employer insofar as they displace the employer's need to pay wages or other forms of compensation from its general assets and permit the employer to attract, retain, and motivate employees. But that does not mean that the rules permit the distribution of plan assets in return for any thing of value—such as the broad waivers of liability at issue in this case—so long as the distributions are made in the form of benefits.

B. Pension plans that lawfully excluded employees from participation on account of age before enactment of OBRA 1986, are not required, for purposes of calculating aggregate benefit accruals, to treat such employees as if they had been plan participants. Although OBRA 1986 amended ERISA to eliminate the statutory exception that permitted plans to exclude certain employees from participation, that change was expressly made prospective-only. The court of appeals erred in relying on a separate provision of OBRA 1986 that made it unlawful for a plan to cease accruing benefits for an employee (or reduce the rate of accrual) because of the employee's attainment of a particular age. A lesser amount of total benefits that results from an employee's having participated in a plan for fewer years is not the same thing as a reduction caused by a decrease in the rate of a participant's benefit accrual. There is no violation of the accrual rules if, as in this case, once the employee becomes a participant, his benefits accrue without cessation or decrease in rate.

ARGUMENT

I. LOCKHEED'S AMENDMENT OF THE PLAN DID NOT ITSELF CONSTITUTE A PROHIBITED TRANSACTION IN VIOLATION OF SECTION 406(a)(1)(D) OF ERISA

Section 406 of ERISA, 29 U.S.C. 1106, supplements Section 404's "core" fiduciary duties of loyalty and prudence, 29 U.S.C. 1104, by setting out categories of "prohibited transactions" in which a fiduciary may not cause a plan to engage, regardless of the fairness or reasonableness to the plan of any particular transaction. See *Commissioner* v. *Keystone, Consol. Indus., Inc.*, 113 S. Ct. 2006, 2112 (1993) ("Congress' goal was to bar categorically a transaction that was likely to injure the pension plan."). Section 406(a) forbids a fiduciary from causing a plan to engage in specific types of transactions with (or benefitting) a "party in interest," 29 U.S.C. 1106(a), a term that is defined broadly to include, among others, the plan sponsor and its employees, 29 U.S.C. 1002(14)(C), (D) and (H). Section 406(b), in turn, addresses certain matters implicating fiduciary conflicts of interest. 29 U.S.C. 1106(b).[3] Title II of ERISA reinforces Section 406's fiduciary-directed rules by requiring any "disqualified person" (a term that includes most parties in interest) who participates in a prohibited transaction to pay an excise tax on the transaction and to correct it. See 26 U.S.C. 4975; *Commissioner* v. *Keystone Consol. Indus., Inc., supra.*

[3] ERISA provides various remedies for violations of Title I's prohibited transaction rules. Plan fiduciaries may be required to make good to the plan any losses resulting from prohibited transactions they have caused. 29 U.S.C. 1132(a)(2) and 1109(a). The courts are also authorized to provide injunctive relief and "other appropriate equitable relief" to redress violations of the Act. 29 U.S.C. 1132(a)(3). The appropriate remedy for a prohibited transaction is correction, *M & R Investment Co.* v. *Fitzsimmons*, 484 F. Supp. 1041, 1057 (D. Nev. 1980), aff'd, 685 F.2d 283 (9th Cir. 1982), see 26 U.S.C. 4975(h), which entails "undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards," 26 U.S.C. 4975(f)(5), (h)—*e.g.*, through an order requiring the party in interest to disgorge to the plan any unjust enrichment.

In addition to the transactions enumerated in Sections 406(a)(1)(A)-(C) (sales, exchanges, and leases of property; extensions of credit; and the furnishing of goods or services between the plan and a party in interest), Section 406(a)(1)(D) prohibits a fiduciary from causing the plan to engage in any transaction the fiduciary knows or should know "constitutes a direct or indirect * * * transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." 29 U.S.C. 1106(a)(1)(D).

1. The prohibited transaction rules in Title I of ERISA do not speak to the lawfulness of transactions, but rather to the lawfulness of fiduciary conduct.[4] Section 406(a) is violated only when a *fiduciary* causes the plan to engage in one of the enumerated transactions. The court below erred in holding that the amendment of the Plan constituted a prohibited transaction, because Lockheed was not acting in a fiduciary capacity when it amended the Plan.

A plan sponsor does not act as a fiduciary when it creates, amends, or terminates a pension plan. See Pet. 9-11 (citing decisions by the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits); cf. *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1228 (1995) ("[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan.") (citation omitted). As defined by Section 3(21)(A) of ERISA, 29 U.S.C. 1002(21)(A),.

[4] The corresponding provisions in Title II of ERISA are concerned solely with the transaction itself, and do not require any showing of fiduciary conduct. 26 U.S.C. 4975(a)-(c).

a person is a fiduciary only "to the extent" that the person (i) exercises certain management authority or control over the plan or its assets; (ii) renders investment advice for a fee or has authority to do so; or (iii) has discretionary authority or responsibility in administering the plan. See 29 C.F.R. 2509.75-5. When an employer amends a plan of which it is the sole sponsor, it acts as a settlor, establishing the terms that will govern the plan; the employer is not in that context managing plan assets, administering the plan, or engaging in any other defined fiduciary function. *Joseph Schlitz Brewing Co.* v. *Milwaukee Brewery Workers*, 3 F.3d 994, 1001 (7th Cir. 1993) ("Managing a plan is some distance from establishing the *terms* of a plan."), aff'd, 115 S. Ct. 981 (1995); *Musto* v. *American General Corp.*, 861 F.2d 897, 911 (6th Cir. 1988) ("There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be."), cert. denied, 490 U.S. 1020 (1989).[5]

The separation of fiduciary from settlor functions inheres in the structure of the Act. Congress did not require employers to establish employee benefit plans; it left the decision to establish (or terminate) a plan, and decisions respecting the level of benefits to be provided, largely to private parties. See *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981). When an employer establishes a plan, it does so to further its own business interests. If the employer is a corporation, it must generally ensure, as a matter of state corporation law, that the benefits provided bear a reasonable relationship to employee service to the corporation. See, *e.g.*, *Lieberman* v. *Becker*, 155 A.2d 596, 598 (Del. 1959). If the plan is

[5] Sponsors of multiemployer plans are, in some respects, held to fiduciary standards. See *Siskind* v. *Sperry Retirement Program, Unisys*, 47 F.3d 498, 505-507 (2d Cir. 1995); *Nazay* v. *Miller*, 949 F.2d 1323, 1332-1333 (3d Cir. 1991).

established through collective bargaining, the settlor representing the employer and the settlor representing the labor union each "owes complete loyalty to * * * the interests of [the parties] [they] represent[]." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953). Any attempt to impose on these parties a duty to act "solely in the interest of the participants and beneficiaries," 29 U.S.C. 1104(a)(1); see also 29 U.S.C. 1103(c)(1), would be both unworkable and radically at odds with the balance struck by Congress. "[P]ure business decisions are not governed by fiduciary standards." *Sutter* v. *BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992); see also *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 336 (1981) (atmosphere in which an ERISA fiduciary must operate is "wholly inconsistent with [the collective bargaining] process of compromise and economic pressure").

2. For the foregoing reasons, we agree with petitioners that the court of appeals erred in holding (Pet. App. 13a-14a) that Lockheed violated Section 406(a)(1)(D) of ERISA when it adopted the 1990 Plan amendments. Respondent also alleged in his complaint, however, that the *implementation* of the amendments (granting individual participants enhanced early retirement benefits only upon the participants' execution of a waiver) by the Plan's fiduciaries caused prohibited transactions. See J.A. 22-24; Br. in Opp. i, 3-4. The court of appeals did not specifically address that issue, and this Court accordingly might choose to refrain from doing so. The question whether implementation of the Plan violated Section 406 was not among the questions presented in the certiorari petition. Pet. i, 7-16. Moreover, although petitioners argued in the certiorari petition that there was a circuit conflict warranting resolution by this Court on the question whether an employer acts as a fiduciary (and therefore is subject to the prohibited-transactions provisions in Section 406) when it amends a plan (see Pet. 8-12, Reply Br. Pet. Stage 2-6), they pointed to no such circuit conflict concerning

the application of Section 406(a)(1)(D) to plan administration in this setting. The Court may benefit from allowing for further percolation of the issue in the lower courts.

That course makes particular sense in this case. Respondent has argued that the conditioning of enhanced early retirement benefits on an employee's waiver of claims violates not only Section 406(a)(1)(D) of the Act, but also the general fiduciary duties imposed by Section 404 and the anti-inurement restriction in Section 403(c)(1). See Pet. App. 14a n.5. All of those issues remain open in the court of appeals on remand. In our view, it would be appropriate to allow the court of appeals to consider Sections 403, 404 and 406 together in determining what restrictions are imposed on fiduciaries (and parties in interest) in the *administration* of plan provisions such as those added by Lockheed in 1990, rather than for this Court to consider the application of Section 406(a)(1)(D) in isolation, and to do so without the benefit of the views of the lower courts.

3. We nevertheless shall address some considerations relevant to the application of Section 406(a)(1)(D) in circumstances such as these, in the event that the Court chooses to do the same. In this case, the relevant question would be whether, by authorizing the Plan's trustee to pay enhanced early retirement benefits to eligible employees who, in exchange, executed broad releases of claims against Lockheed (an "employer," and therefore a "party in interest," 29 U.S.C. 1002(14)(C)), the persons who administered the Plan (by definition, fiduciaries, 29 U.S.C. 1002(21)(A)(iii)) "caused" the Plan "to engage in a transaction" that "constitute[d] a direct or indirect * * * transfer [of Plan assets] to, or use [of Plan assets] by or for the benefit of" Lockheed, within the meaning of Section 406(a)(1)(D).

a. Petitioners asserted at the petition stage (Pet. 12 n.5; Reply Br. 5 n.4) that, unless Lockheed acted as a

fiduciary when it amended the Plan, Lockheed and the individual petitioners could not have caused the Plan to engage in a prohibited transaction, or otherwise breached their fiduciary duties, when they administered the amended Plan in accordance with its terms. In essence, they contended that a fiduciary does not "cause" a prohibited transaction by, and can never be faulted for, administering a plan in accordance with its terms. That position is without merit. A plan administrator is a fiduciary with independent statutory responsibilities, 29 C.F.R. 2509.75-8, D-3, and when a fiduciary authorizes a sale or lease of plan property, a loan of plan funds, or (as here) a distribution of plan assets, the fiduciary plainly "causes" the plan to act, in both a proximate and a but-for sense.[6]

A fiduciary is obliged to "discharge his duties with respect to a plan * * * in acordance with the documents and instruments governing the plan," but—critically—only "insofar as such documents and instruments are consistent with" Title I of ERISA. 29 U.S.C. 1104(a)(1)(D). That proviso makes clear that a fiduciary is not to give effect to a plan provision when to do so would violate the Act. See *Central States*, 472 U.S. at 568 ("trust documents cannot excuse trustees from their duties under ERISA"); Chamber of Commerce Amicus Br. Pet. Stage 9-10 ("[T]he plan administrator has a duty not to give

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[6] The concept that a plan administrator is a mere functionary charged with mechanical application of the sponsor's written instructions is foreign to ERISA. Cf. *Schoonejongen*, 115 S. Ct. at 1230 (noting that plan administrator's duty to operate plan in accordance with governing documents may include responsibility to "sort[] out, from among the occasional corporate communications that pass through their offices and that conflict with existing plan terms, the bona fide amendments from those that are not"); *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 571-572 (1985) (trustees have duty to act affirmatively to ensure that employer pays funds owed to plan).

effect to plan amendments that constitute prohibited transactions.").[7]

Petitioners' contrary view would eliminate plan fiduciaries' independent responsibility for ensuring that their management of plan assets and administration of the plan complies with ERISA's fiduciary standards, thereby nullifying an internal check and balance that is critical to enforcement of the Act. See 29 U.S.C. 1110(a) (any plan provision that purports to relieve a fiduciary of his duty to comply with the requirements of the Act is "void as against public policy"). Because the fiduciary necessarily retains an obligation to determine the lawfulness of his conduct, the fiduciary may not—by disavowing that he is "the cause"—effect a sale of plan property to the employer (in violation of Section 406(a)(1)(A)), make a loan of plan funds to the employer (in violation of Section 406(a)(1)(B)), execute a contract for goods or services between the plan and the employer (in violation of Section 406(a)(1)(C)), or transfer plan assets to the employer (in violation of Section 406(a)(1)(D)), regardless of any directives contained within the governing plan documents.[8]

b. The other operative terms in Section 406(a)(1)(D) —"transaction," "use," and "benefit"—are not defined by ERISA. In ordinary usage, however, the provision of enhanced retirement benefits in exchange for an employ-

[7] Similarly, at common law, "[t]he trustee is not under a duty to the beneficiary to comply with a term of the trust which is illegal." Restatement (Second) of Trusts § 661(1), at 347 (1959); accord 2A W.F. Fratcher, *The Law of Trusts* § 166, at 265 (4th ed. 1987).

[8] Similarly, a fiduciary may not follow provisions in plan documents that direct an imprudent investment policy. See DOL Advisory Op. (unnumbered), 1988 ERISA LEXIS 19 (Feb. 23, 1988) ("ERISA contains no provision which would relieve an investment manager of fiduciary liability for any decision he made at the direction of another person.").

ee's early retirement and release of claims against the employer is a "transaction." See *Webster's Third New International Dictionary* 2425 (1986) ("act, process, or instance of transacting"); *ibid.* (to "transact" is to "carry on business"); *Black's Law Dictionary* 1496 (6th ed. 1990) ("[a]n act, agreement, or several acts or agreements between or among parties whereby a cause of action or alteration of legal rights occur"). The payment of increased pension benefits is one "use" of plan assets. See *Webster's Third New International Dictionary, supra*, at 2523-2524 (to "employ" or "utilize"). And that use of plan assets here redounded to Lockheed's "benefit," *Black's Law Dictionary, supra*, at 158 ("advantage or profit"), particularly insofar as the enhanced benefits were exchanged for the releases.[9]

Section 406(a)(1)(D) cannot, however, be read to prohibit all transactions that might be thought to fall within its literal terms, for under such a reading all benefit payments would be forbidden: Since pension benefits compensate employees for their service to the employer, the provision of pension benefits is an indirect use of plan assets for the benefit of the employer.[10] Congress clearly did not intend to prevent employers from compensating employees for their labor in the form of pension benefits

[9] Petitioners do not claim that they were unaware that the execution of the releases benefited Lockheed. This case does not present a question, therefore, whether the Plan's fiduciaries "kn[ew] or should [have] know[n]" that the exchanges of enhanced early retirement benefits for waivers were uses of plan assets for the benefit of Lockheed. See 29 U.S.C. 1106(a).

[10] Although an "employee" is also a "party in interest" (29 U.S.C. 1002(14)(C) and (H)), the payment of pension benefits does not constitute a direct transfer of plan assets to a party in interest. By the time pension payments are made, the participant is no longer employed by the employer, and he is therefore no longer an "employee" within the meaning of the Act. 29 U.S.C. 1002(6).

or to interfere with an employer's freedom to design (and modify from time to time) the optimal mix of wages and benefits in its compensation package. The primary purpose of ERISA, after all, was to encourage and safeguard the payment of pension benefits. See 29 U.S.C. 1001; see also 29 U.S.C. 1104 (fiduciaries are required to discharge their duties to the plan "for the exclusive purpose of * * * providing benefits to participants and their beneficiaries").

A court must therefore "go beyond" what is, for present purposes, the "unhelpful text," *New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995), in order to harmonize the broad language of Section 406(a)(1)(D) with the overall structure and evident purposes of ERISA. But the text cannot be ignored altogether. The prohibitions in Section 406(a) reflect, in part, Congress's intent that employers not be permitted to obtain plan assets before employees receive the benefits to which they are entitled, a concern that is manifested in several provisions of the Act. See, *e.g.*, 29 U.S.C. 1103(c)(1) (unless excepted, "the assets of a plan shall never inure to the benefit of any employer"); 26 U.S.C. 401(a)(2) (no part of a tax-qualified fund may be "used for, or diverted to, purposes other than for the exclusive benefit of [the employer's] employees").[11] Although that concern obviously would

[11] Contrary to the suggestion of amici ERISA Industry Committee, et al. (ERIC) at the petition stage (Br. 18-19), the fact that an employer has a reversionary interest in a plan's assets upon the plan's termination, 29 U.S.C. 1344(d), does not mean that the employer should be permitted free access to those assets outside of the context of plan termination. ERISA's provision for reversion of residual assets upon termination is an express exception to the general rule that "the assets of a plan shall never inure to the benefit of any employer." 29 U.S.C. 1103(c)(1) and (d). Reversion is permitted upon termination only subject to the employee-protective provisions of 29 U.S.C. 1344, which make clear, among other things, that the employer may receive a distribution only after "all liabilities of the plan to participants and

not justify forbidding the use of plan assets to fund ordinary pension benefits when a participant retires, it counsels against permitting uses that depart substantially from that paradigm.

The benefit that Lockheed received in this case in exchange for the payment of enhanced early retirement benefits differed in kind from the sorts of benefits that an employer ordinarily receives in exchange for pensions. Pension distributions normally relate to an employee's level of compensation or years of service, or both. See 26 U.S.C. 415(b), (c). That is to be expected, because employee benefits developed as "a means of compensating workers in lieu of increased wages, thus making pension benefits a form of deferred wages." S. Rep. No. 127, 93d Cong., 1st Sess. 3 (1973); see also H.R. Rep. No. 533, 93d Cong., 1st Sess. 2-3 (1973). Although the enhanced benefits provided under Lockheed's early retirement programs may be viewed, in part, as consideration for both

their beneficiaries have been satisfied," 29 U.S.C. 1103(c)(1) and (d); 29 U.S.C. 1108(b)(9), and even then the reversion is subject to an excise tax in an amount equal to 20%-50% of the reversion, 26 U.S.C. 4980(a) and (c).

Sections 401(h) and 420 of the Internal Revenue Code also permit a limited use by the employer of plan assets, by transferring them to a separate account in the plan for the purpose of paying retiree medical benefits under certain carefully defined circumstances. 26 U.S.C. 401(h) and 420, amended by Pub. L. No. 103-465, Tit. VII, §§ 731, 732, 108 Stat. 5003-5004 (1994). Congress enacted specific exemptions from the anti-inurement and prohibited transaction provisions of ERISA for such transfers. See 29 U.S.C. 1103(c)(1) and 1108(b)(13) (Supp. V 1993). The implication of those exceptions, of course, is that an employer's use of plan assets for that purpose might otherwise constitute a prohibited transaction by relieving the employer of responsibility for paying such retiree health benefits. See H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 1147 (1990) ("Although the decision to transfer assets is a settlor decision made by the employer, the implementation of that decision by the fiduciary is subject to the fiduciary duties and legal and equitable remedies under ERISA.").

past services and foregone future wages and benefits (to the extent that the pension benefits compensate the employees for their early retirement), the enhanced benefits were also, in part, consideration for the employees' releases of legal claims against Lockheed. Those releases purported to relieve Lockheed of potential liabilities (perhaps substantial in amount) for past conduct, including torts that Lockheed may have committed (*e.g.*, defamation or sexual harassment) against the signatories. The execution of releases of accrued claims against the employer is not a routine incident of the employment relationship, and paying employees to give up their accrued claims cannot be equated with compensation for services rendered.

Petitioners concede (Pet. 13) that plan fiduciaries would have violated Section 406(a)(1)(D) if they had simply taken funds from the Plan and used those funds to write checks to the employees to settle adverse claims against Lockheed. That would have been both a direct "transfer" to Lockheed of Plan assets and a direct "use" of Plan assets "by" and "for the benefit of" Lockheed. The fact that the employees in this case were instead compensated for their individual releases in the form of enhanced pension benefits does not in itself remove those transactions from the reach of Section 406(a)(1)(D). That Section reaches "indirect" as well as "direct" uses. The arrangement here conferred a real, if "indirect," benefit on Lockheed: the employee entered into an agreement with the plan under which plan assets are given to the employee (in the form of benefits) in exchange for the employee's transfer of a potentially valuable asset (the release of claims) to the employer. Cf. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 309 (1974) ("[I]t is expected that where a mutual fund, *e.g.*, acquires property from a party-in-interest as part of the arrangement under which the plan invests or retains its investment in the mutual fund, this is to be a prohibited transaction."); 29 C.F.R. 2509.75-

2(c) ("[T]he purchase by a plan of an insurance policy pursuant to an arrangement under which it is expected that the insurance company will make a loan to a party in interest is a prohibited transaction.").[12]

If every transfer of plan assets in the form of benefits were insulated from scrutiny under Section 406(a), then an employer that desired to acquire the land underlying the homes of employees who lived adjacent to its factory could purchase that land with the plan's assets, simply by amending the plan to make signing over the deed to a designated home a criterion of eligibility for significantly enhanced benefits. More typically, an employer might design a plan under which eligibility for all benefits, other than minimal benefits provided upon "normal" retirement, see 29 U.S.C. 1054(b), would be conditioned on the participant's execution of periodic releases. In the absence of language so directing, it would be odd to interpret Section 406(a)(1)(D) to permit employers to purchase employees' assets or to pay off any and all employee claims with tax-deferred pension funds.

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[12] Although Section 408 of ERISA (29 U.S.C. 1108) exempts several categories of transactions that fall within the scope of Section 406, there is no exception that in terms covers the indirect benefit gained by an employer as an aspect of transactions that also involve the payment of pension benefits to participants. Section 408(b)(9) relates to "the making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan *if such assets are distributed in the same manner as provided under [Section 4044 of ERISA, 29 U.S.C.] 1344*" (emphasis added). Section 4044 of the Act concerns only the allocation of assets upon plan termination. That exception was necessary to permit the direct transfer of plan assets to existing employees and the reversion of surplus plan assets to the employer when a plan is terminated; it does not appear that it was designed to address the payment of benefits under an ongoing plan; and it seems most unlikely that Congress intended Section 408(b)(9) to create a categorical exception to Section 406 for all prohibited transactions made in the form of benefit payments, so long as those transactions are "in accordance with the terms of the plan."

c. An interpretation of Section 406(a)(1)(D) that prohibits all nonexempt uses of plan assets for the benefit of employers, other than the distribution of plan assets as ordinary pension benefits (*i.e.*, in return for services rendered), makes sense of the prohibition in the overall framework of ERISA without casting doubt on accepted and routine uses of pension plans. So long as it is clear that plan assets may be employed freely to pay pension benefits awarded as compensation for services, there can be no dispute over employers' ability to "create or amend their pension plans * * * to add new benefits or increase present benefits for express corporate purposes such as attracting and retaining employees, deferring employee compensation from immediate taxation, settling collective bargaining disputes, avoiding strikes, and providing compensation increases without using immediate cash or in lieu of wage increases." Pet. 14.[13]

An employer may provide increased pension benefits as an incentive for early retirement, because such an arrangement merely modifies the composition of the overall compensation package: Enhanced pensions are granted as compensation for the employees' past services, as well as for the wages and other benefits they would have re-

[13] Cf. T.A.M. LTR 9516005 (Dec. 22, 1994) (parallel prohibited-transaction provision of Internal Revenue Code, 26 U.S.C. 4975 (c)(1)(D), allows employer to amend pension plan to provide for payment of supplemental retirement benefits previously paid out of employer's general assets under obligation undertaken by employer as incentive for early retirements). Conditioning the payment of benefits on the takeover of a company, as in *Johnson* v. *Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994), is also permissible because it is the possibility (threat), embodied in the plan itself, that benefit payments may be made, not the actual payment of plan assets, that benefits the employer. Moreover, in that situation, the fiduciary's payment of enhanced benefits upon the occurrence of the takeover contingency does not result in an employee-specific transaction that includes a particularized transfer of value to the employer, as in this case.

ceived if they had not retired, and the increased benefits have the incidental effect of increasing morale among the employees who remain on the job during a company downsizing.[14] By the same token, a waiver of ADEA or other claims arising out of the early retirement itself may be regarded as reasonably incidental to the employee's retirement, and therefore to the payment of benefits.

There is no occasion here to resolve the application of Section 406(a)(1)(D) in these and myriad other situations. Nor, more narrowly, is there any occasion at this stage of the case to determine what claims might properly be included in a release that is made a condition of an employee's early retirement. The releases at issue in this case—which waived "virtually all employment-related claims * * * against Lockheed" (Pet. App. 4a)—went well beyond forestalling any dispute over the employees' contract of employment or their retirement. The releases purported to relieve Lockheed of potential liabilities for a broad range of past occurences, such as toxic torts, work-related injuries, and race or sex discrimination. At least to that extent, the distribution of Plan assets in exchange for the releases would appear to constitute a prohibited "use by or for the benefit of a party in interest" of

[14] Increasing benefits under a pension plan in exchange for a retiree's agreement not to compete with the employer is similarly a way of compensating the retiree for continuing a form of behavior (not working for competitors) that an employer generally expects of its employees as a condition of their employment. See 26 C.F.R. 1.61-21(a)(3). We note, however, that a plan provision for forfeiture of pension benefits if the beneficiary does not comply with a covenant not to compete may violate ERISA's accrual or vesting requirements. See 29 U.S.C. 1053; 29 U.S.C. 1054(g); 26 U.S.C. 411(d)(6); 26 C.F.R. 1.411(d)-4, A-4 (violation when plan allows employer discretion to deny participant protected benefit for which participant is otherwise eligible); 26 C.F.R. 1.411(d)-4 A-6 (permissible to condition availability of single sum distribution on execution of covenant not to compete); see *Noell* v. *American Design Inc.*, 764 F.2d 827, 831 (11th Cir. 1985).

Plan assets, in violation of Section 406(a)(1)(D) of ERISA.[15]

II. OBRA 1986 DOES NOT REQUIRE AN EMPLOYER TO CONSIDER FOR PURPOSES OF BENEFIT ACCRUAL YEARS OF SERVICE IN WHICH AN EMPLOYEE WAS LAWFULLY EXCLUDED FROM PARTICIPATING IN A PENSION PLAN BECAUSE OF HIS AGE

ERISA has, from its inception, prohibited pension plans from excluding employees from participation because of their attainment of a specified age. Before the enactment of OBRA 1986, however, that prohibition did not apply with respect to "employees [who] beg[an] employment with the employer after they ha[d] attained a specified age which [wa]s not more than 5 years before the normal retirement age under the plan." 29 U.S.C. 1052(a)(2)(B) (1982); 26 U.S.C. 410(a)(2)(B) (1982). In accord with then-existing law, Lockheed's Plan excluded from participation any employee hired within five years of "normal retirement age," which was 65. Because respondent was hired by Lockheed when he was 61 years old, he was lawfully excluded from participating in the Plan.

Section 9203(a) of OBRA 1986 amended both 29 U.S.C. 1052(a)(2) and 26 U.S.C. 410(a)(2) to eliminate that exception to the general anti-discrimination rule. 29 U.S.C. 1052(a)(2) now provides: "No pension plan may exclude from participation (on the basis of age) employees who have attained a specified age." 26 U.S.C. 410(a)(2) now provides: "A trust shall not constitute a qualified trust under section 401(a) if the plan of which it is a part excludes from participation (on the basis of age) employees who have attained a specified age." Those amendments apply, however, "only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after such date." OBRA 1986 § 9204(b), 100 Stat. 1980.

In response to OBRA 1986, Lockheed amended the Plan to include all eligible employees (including respondent) as participants irrespective of their age when hired, starting with the plan year beginning on December 25, 1988. Respondent began accruing Plan benefits as of that date. He received no credit, however, for his prior period of employment (1979 to December 25, 1988), during which he had been lawfully excluded from participation.

1. In holding that respondent should have been credited with the level of benefits that he would have accrued

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[15] That conclusion is not inconsistent either with Treasury Department regulations (Pet. 15-16) or the ADEA (Pet. 28). As petitioners observe (Pet. 15-16), the Treasury Department has issued regulations that permit the use of covenants not to compete and waivers of age discrimination claims. Those regulations, however, speak only to compliance with the non-discrimination and vesting requirements for tax-qualified pension plans. See, *e.g.*, 26 C.F.R. 1.411(a)-4(c), Example 1; 26 C.F.R. 1.401(a)(4)-4(b)(2)(ii)(B). The Treasury Department has expressly cautioned that compliance with those regulations does not ensure compliance with the provisions of Title I of ERISA, which the Secretary of Labor administers. 58 Fed. Reg. 46,773, 46,778 (1993).

The Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, § 201, 104 Stat. 983, amended the ADEA to regulate the conditions under which employees may waive age discrimination claims. See 29 U.S.C. 626(f)(1). Although Congress understood that such waivers were used in some early retirement programs, 29 U.S.C. 626(f)(1)(H), not all early retirement programs involve the use of pension benefits, and OWBPA does not specifically address whether employers may condition receipt of pension benefits on a waiver of age discrimination claims, much less a waiver of all employment-related claims. Finally, although the issue has not been raised in this case, there is some question whether an employer is required to offer a greater early retirement enhancement to those employees who waive ADEA claims than to employees who have no potential ADEA claims. The Equal Employment Opportunity Commission has established a negotiated rulemaking advisory committee to study this and other questions related to the waiver of rights and claims under the ADEA. See 60 Fed. Reg. 45,388 (1995).

had he been a participant all along, the Ninth Circuit applied OBRA 1986 retroactively; *i.e.*, as if the modifications that it made to ERISA had always been the law. That treatment is inconsistent with the plain text of OBRA 1986 and with the interpretation of that text by the Department of the Treasury. Section 9203(a) of OBRA 1986 eliminated provisions in ERISA that had expressly permitted plans to exclude certain employees from participation in pension plans because of their age, but the text of Section 9203(a) does not direct plans, for purposes of determining total accrued benefits, to treat those employees who were lawfully excluded from participation as if they had always been plan participants. In the absence of any statutory language suggesting that plans have a duty to rectify past lawful discrimination, there is no basis for applying Section 9203(a) retroactively. See *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1505 (1994). Section 9204(b) of OBRA 1986 confirms the prospective-only nature of Section 9203(a). It provides in no uncertain terms that the amendments made to ERISA's participation rules apply "only with respect to service performed" in plan years beginning on or after January 1, 1988.

The Secretary of the Treasury has consistently interpreted Section 9203(a) to have only prospective effect. The preamble to the Department's proposed regulations regarding the application of OBRA 1986 explained as follows:

> In the case of an employee who was ineligible to participate in a plan before the effective date of amended Code section 410(a)(2) because of a maximum age condition and who is eligible to participate in the plan on or after the effective date of such section, * * * *hours of service and years of service credited to the employee before the first plan year beginning on or after January 1, 1988, are not required to be taken into account for purposes of determining the employee's accrued benefit under the plan for plan years beginning on or after January 1, 1988.*

53 Fed. Reg. 11,877 (1988) (emphasis added). The proposed regulation (Prop. Treas. Reg. § 1.411(b)-2(f)(1)(ii)) states unequivocally that "a defined benefit plan is not required under section 411(b)(1)(H) [of the Internal Revenue Code] to take into account for benefit accrual purposes any year of service completed before an employee becomes a participant in the plan." *Ibid.*

The court of appeals correctly observed (Pet. App. 13a n.3) that the Treasury Department's proposed regulations have not been finalized.[16] The preamble to the proposed regulations, however, advised that "taxpayers may rely on the[] proposed regulations for guidance pending the issuance of final regulations." 53 Fed. Reg. at 11,878. In light of the reliance that taxpayers have placed on the proposed regulations, and because the Secretary of the Treasury is charged with interpreting the OBRA 1986 provisions at issue, see 26 U.S.C. 411(b)(1)(H)(v); 29 U.S.C. 1054(b)(1)(H)(vi); Reorganization Plan No. 4 of 1978, 92 Stat. 3790, the Secretary's consistent interpretation is entitled to substantial deference.

2. The court of appeals appears to have appreciated that Section 9203(a) of OBRA 1986 applies only prospectively. See Pet. App. 12a. Hence, the court did not rely on the OBRA 1986 amendments to ERISA's participation rules to support its conclusion that respondent must be credited with the years of service he performed before he became a plan participant. The court looked instead to Sections 9201 and 9202 of OBRA 1986, which address a different discriminatory practice—the termination of further accrual of pension benefits by

[16] On December 9, 1988, the Internal Revenue Service announced that it intended to promulgate final regulations consistent with the proposed regulations, I.R.S. Notice 88-126, 1988-2 C.B. 538, but no final regulations have been issued to date.

a person who *was* a participant, upon the participant's attainment of normal retirement age. See generally 43 Fed. Reg. 43,264 (1978); *AARP* v. *EEOC*, 655 F. Supp. 228 (D.D.C.), rev'd, 823 F.2d 600 (D.C. Cir. 1987).

Section 9201 of OBRA 1986 amended the ADEA to forbid any sponsor from establishing or maintaining a pension plan that requires or permits "the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age." See 29 U.S.C. 623(i)(1). Section 9202 made corresponding changes to Titles I and II of ERISA. See 26 U.S.C. 411(b)(1)(H)(i) ("[A] defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age."); 29 U.S.C. 1054(b)(1)(H)(i) (same). The amendments made by Sections 9201 and 9202 apply "only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply." OBRA 1986 § 9204(a)(1), 100 Stat. 1979.

The Secretary of the Treasury's proposed regulations provide that, unlike the amendments concerning age-discrimination in plan eligibility requirements (which were entirely prospective), OBRA 1986's prohibition on discrimination with regard to benefit accrual applies retroactively in certain contexts, to wit, with respect to persons who were participants prior to the effective date of OBRA 1986, who had 1 hour of service in a plan year beginning on or after January 1, 1988, and whose benefit accruals had been terminated or reduced in a prior year on account of attaining a certain age. Prop. Treas. Reg. § 1.411(b)-2(f)(1)(ii), 53 Fed. Reg. 11,876, 11,884 (1988). In Notice 88-126, 1988-2 C.B. 538 (1988), the Internal Revenue Service announced its

intention to adhere to that proposal when it issues final regulations.[17]

OBRA 1986's prohibition on the termination (or reduction in the rate) of accrual of a participant's benefits on account of age has no application in this case.[18] Before respondent became a Plan participant, he had no entitlement to the accrual of pension benefits. See 29 U.S.C. 1054(b) (specifying accrual requirements for *participants* in defined benefit plans); 26 U.S.C. 411(b)(1) (same). Respondent became a participant in the Plan on December 25, 1988, the first day of the first Plan year beginning on or after January 1, 1988, and his pension accrued thereafter without cessation or a reduction in rate until his retirement.

In holding that the Plan's treatment of respondent nonetheless violated OBRA 1986, the court of appeals stated (Pet. App. 7a):

> The most natural reading of the text of OBRA 1986 §§ 9201 and 9202 compels us to conclude that pre-enactment service years must be included in benefit

[17] Contrary to respondent's argument (Br. in Opp. 27-28), nothing in the December 9, 1988, IRS Notice implied that the Secretary of the Treasury has changed his view (as stated in the proposed regulations) that pension plans are not required to take into account for benefit accrual purposes any year of service completed before an employee became a participant. Indeed, the Notice stated that the final regulations would "adopt the position taken in the proposed IRS regulations with respect to years of service that may not be disregarded because of age in determining benefits." 1988-2 C.B. 538. The further comment that the final regulations would "*generally* provide that no year of service (including years of service before 1988) may be disregarded because of age in determining a participant's benefit," *ibid.* (emphasis added), does not suggest that plans are required to include years of service completed before the employee even became a participant.

[18] Accordingly, the correctness of the Secretary of the Treasury's proposed regulations insofar as they provide for limited retroactive application of Sections 9201 and 9202 of OBRA 1986 is not at issue here.

> accrual calculation. OBRA prohibits age-based reduction in "the rate of benefit accrual." Denying credited service years that an employee would have accumulated but for prior age-based exclusion from the plan results in a reduced rate of benefits for that employee.

The court's explanation demonstrates that its ruling was based on a fundamental misunderstanding. The court equated a decrease in total benefits with a decrease in the "rate" of benefit accrual. Although the rate of accrual affects the total benefits accrued, it is one of several factors, which include, in addition, the participant's date of participation, years of service, and salary level. For example, a participant may be entitled to a rate of benefit accrual of two percent of salary for each year of service:

$$\text{Total Accrued Benefit} = .02 \times \text{Salary} \times \text{Years}$$

A reduction in any of the factors will decrease the product. Sections 9201 and 9202 of OBRA 1986, however, address only a cessation of accrual (*i.e.*, making the "rate" zero) or a reduction in the rate of accrual. The effect of OBRA 1986, in the context of the example, would be to prohibit the plan from providing that a participant would accrue only one percent of salary for each year of service performed after he reached normal retirement age.[19]

In this case, the Plan did not cease accruing pension benefits for respondent or reduce the rate of his pension's accrual. After respondent became a participant, on December 25, 1988, he accrued benefits at the same rate as all other participants in the plan. His total accrued benefit is unquestionably less than it would have been had

[19] Sections 9201 and 9202 of OBRA 1986 would also bar indirect or sham attempts to reduce the rate of accrual—*e.g.*, by providing that, once a participant reaches normal retirement age, the participant's salary or years of service in ensuing years will be counted at only 50% of their actual values for purposes of benefit accrual.

he been permitted to participate in the Plan from 1979, when he was first hired by Lockheed. But his exclusion from participation was lawful at the time, and, while Congress has since eliminated the provisions that permitted respondent's exclusion, that change was prospective-only. Sections 9201 and 9202 may not be invoked, as they were in this case, to circumvent Congress's considered judgment not to require plans to accrue benefits retroactively for years of service in which an employee was lawfully excluded from participation.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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